



BRB No. 17-0097

MARK B. HARDMAN  
(Deceased)

Claimant-Petitioner

v.

MARINE TERMINALS CORPORATION

and

SIGNAL MUTUAL INDEMNITY  
ASSOCIATION, LIMITED

Employer/Carrier-  
Respondents

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR

Respondent

DATE ISSUED: Oct. 18, 2017

DECISION and ORDER

Appeal of the Order on Remand – Attorney’s Fees and the Order Denying Motion for Reconsideration of R. Todd Bruininks, District Director, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Remand – Attorney’s Fees and the Order Denying Motion for Reconsideration of District Director R. Todd Bruininks (OWCP No. 14-149888) rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney’s fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

This is the second time this case has been appealed to the Board. To recapitulate, following the parties’ settlement of claimant’s claim for benefits, claimant’s counsel filed a petition for an attorney’s fee for work performed before the Office of Workers’ Compensation Programs between September 25, 2007 and May 18, 2014. Counsel requested a fee of \$14,178, representing 30.5 hours of attorney time at an hourly rate of \$450 and 3.7 hours of legal assistant time at an hourly rate of \$165, plus \$536.98 in costs. Employer filed objections, challenging as excessive a few of the itemized entries and the hourly rates for attorney and legal assistant services. Claimant’s counsel filed a reply to the objections and included a request for an additional fee of \$675 for 1.25 hours of attorney time.

The district director reduced the requested hourly rate to \$385 for attorney services and the hourly rate for legal assistant services to \$140 for time expended from 2007 to 2011. The district director used the 2014 Federal locality pay increase of one percent for Portland, Oregon, to award counsel an hourly rate of \$389 and his legal assistant a rate of \$141.40 for work performed in 2014. The district director reduced by one hour the time counsel requested to correct clerical errors in claimant’s request for mileage reimbursement and 1.5 hours expended for preparing the fee petition and counsel’s reply to employer’s fee objections. Accordingly, the district director awarded counsel a fee of \$11,761.60, representing 24.2 hours at \$385 per hour, 4.95 hours at \$389 per hour, 2.95 legal assistant hours at \$140 per hour, and .75 of legal assistant time at \$141.40 per hour. The district director awarded costs of \$536.98.

Claimant’s counsel appealed the fee award to the Board, challenging the district director’s baseline hourly rate calculations, use of the Federal locality pay increase to account for the delay in payment for services rendered between 2007 and 2011, and failure to account for delay in payment for services rendered in 2013 and 2014.

The Board affirmed the district director's baseline hourly rate calculation, but agreed with claimant that using the increase in Federal locality pay to account for delay was improper as that increase was based on political or budgetary considerations rather than cost-of-living considerations. *Hardman v. Marine Terminals Corp.*, BRB No. 16-0132 (Aug. 29, 2016) (Buzzard, J., concurring and dissenting). Accordingly, the Board remanded the case for the district director to use any reasonable method to compensate counsel for the delay in payment of the attorney's fee. Additionally, because the district director did not address counsel's assertion that he is entitled to be compensated for the delay in payment for services rendered in 2013 and 2014, the Board directed the district director to address that argument in the first instance. *Id.*

On remand, the district director adjusted counsel's 2011 baseline rates for inflation through 2016 by using the percentage change in the national Consumer Price Index. Thus, counsel's 2011 hourly rate of \$385 was adjusted to a 2016 rate of \$412.24, and the paralegal's 2011 hourly rate of \$140 was adjusted to a 2016 rate of \$149.90. The district director awarded these rates for all services between 2007 and 2011 to account for the delay in payment for services. With respect to counsel's hourly rate for services rendered in 2013 and 2014, the district director adjusted counsel's 2011 baseline rates using the percentage change in the national Consumer Price Index to arrive at a rate of \$398.72 for counsel's services in 2013, \$405.19 for his services in 2014, and \$147.34 for paralegal services in 2014. The district director rejected counsel's assertion that he is entitled to be compensated for the delay in payment for his 2013 and 2014 services. In so finding, the district director explained that he initially awarded counsel an attorney's fee on November 2, 2015; therefore, the delay between the date the services were rendered and the fee was awarded was ordinary delay that spanned less than two years. Thus, the district director awarded claimant's counsel an attorney's fee totaling \$12,477.16, representing 19.95 hours of attorney time for services rendered from 2007 through 2011 at \$412.24 per hour and 2.95 hours of paralegal time at \$149.90 per hour for the same period, 4.25 hours of attorney services in 2013 at \$398.72 per hour, 4.95 hours of attorney services in 2014 at \$405.19 per hour, and .75 hour of paralegal time for services in 2014 at \$147.34 per hour, plus the previously awarded costs of \$536.98.

Claimant's counsel filed a motion for reconsideration, asserting that the increase in the national Consumer Price Index is not the best means to account for the delay in payment of an attorney's fee and that he is entitled to be compensated for the delay in payment for services rendered in 2013 and 2014. The district director summarily denied claimant's counsel's motion.

On appeal, claimant's counsel challenges the district director's use of the increase in the national Consumer Price Index to adjust for delay, asserting that it is not a measure of the change in wages and is not specific to the relevant market. Counsel contends that the district director should have accounted for delay using the change in the Oregon

average weekly wage, rather than the change in cost of consumer goods. Counsel further argues that the district director should have accounted for the delay in payment for services rendered in 2013 and 2014. In separate briefs, employer and the Director, Office of Workers' Compensation Programs, respond, urging affirmance on the ground that claimant's counsel has not established that the district director abused his discretion. Claimant's counsel filed a reply brief.

The issue of delay concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). When appropriate, historical rates should be adjusted for inflation so that the rate reflects either current rates or present value of historical rates. *See Modar v. Maritime Services Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Christensen v. Stevedoring Services of America, Inc.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 455 F. App'x 912 (9th Cir. 2011). The district director has discretion in determining a reasonable method for calculating a fee enhancement. *See generally Gates v. Deukmejian*, 987 F.2d 1392, 1407 (9th Cir. 1992).

We reject counsel's contention that the district director erred in using the percentage change in the Consumer Price Index to adjust counsel's base hourly rate for the delay in payment of the fee. As there is no set manner by which delay is to be compensated, it cannot be said that the district director's conclusion is arbitrary, capricious, based on an abuse of discretion or not in accordance with law.<sup>1</sup> *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). Therefore, we affirm the rates awarded for services from 2007 to 2011.

Moreover, claimant's counsel has not shown that the district director abused his discretion in awarding counsel his historic rates for services rendered in 2013 and 2014. *See generally Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). The district director rationally concluded that the delay between the performance of these services and his fee award in November 2015 was "ordinary" delay under the Act. *Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT) (affirming Board's conclusion that two years' delay was "ordinary" and thus did not warrant enhanced fee). As claimant's counsel raises no additional challenges to the district director's Orders on remand, we affirm the fee awarded to claimant's counsel.

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<sup>1</sup> Counsel, himself, previously suggested the use of the Consumer Price Index to adjust his hourly rates for inflation. *Petitt v. Sause Bros.*, BRB No. 13-0330 (Feb. 26, 2014) (unpub.).

Claimant's counsel has filed a fee petition for services rendered in his prior appeal before the Board, BRB No. 16-0132. Counsel's fee petition itemizes 8.5 hours of Mr. Robinowitz's time at \$466 per hour, and 20.25 hours of Ms. Stokes-Avery's time at \$225 per hour for work performed between November 30, 2015 and January 17, 2017. This totals \$8,517.25; however, counsel has reduced his request to \$7,094.87 to reflect the lack of full success in this case.<sup>2</sup> Employer responds, contending that the fee petition was untimely filed, that the requested \$466 hourly rate is excessive, that the fee requested is excessive in light of the amount of the additional award on remand (\$715.56), and that employer is not liable for a fee for any services rendered after February 16, 2016, when it offered to settle the claim for an attorney's fee for an amount greater than counsel was ultimately awarded by the district director. Counsel replies that employer's objections are without merit, and he seeks an additional fee of \$1,068.75 for 4.75 hours of associate time for preparation of the reply to the objections.

Under 20 C.F.R. §802.203(c), claimant's counsel may file a petition for an attorney's fee within 60 days of a decision on remand. The district director's order denying reconsideration was filed on November 3, 2016; thus, claimant's counsel's fee petition was due by January 3, 2017. However, he did not file his petition with the Board until January 24, 2017. In his reply brief, claimant's counsel asserts this tardiness was due to the failure to docket the deadline, but that he filed his petition as soon as possible upon realizing the mistake. We accept claimant's counsel's late-filed fee petition. 20 C.F.R. §802.217.

We next address employer's contention that it is not liable for any attorney's fee after February 12, 2016, when it offered to pay claimant's counsel \$13,233.06 in settlement of his claim for an attorney's fee for work before the district director.<sup>3</sup> Employer made this offer after claimant's counsel filed his petition for review and brief with the Board on January 19, 2016. Employer contends that counsel refused the offer and, through the pursuit of his appeal to the Board and the district director's orders on remand, counsel obtained a total fee and costs of \$13,014.14. Though counsel obtained a greater fee than the district director initially awarded as a result of his appeal to the Board, the total fee counsel obtained was less than employer had offered to pay; thus, employer asserts its liability for an attorney's fee is limited to the work performed prior to its offer.

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<sup>2</sup> Counsel asserts that his Petition for Review and Reply Briefs in BRB No. 16-0132 totaled 12 pages, of which 10 pages, or 83.3 percent, related to issues on which he was successful. Thus,  $.833 \times \$8,517.25 = \$7,094.87$  for services on his successful issues.

<sup>3</sup> Employer has not attached to its objections a copy of its offer to pay this fee, but claimant's counsel does not challenge employer's statement of its offer.

Although there is no binding precedent addressing this factual situation under the Act,<sup>4</sup> we agree with employer that it is not liable for claimant's attorney's fee for work that would have been unnecessary if counsel had accepted the higher offer of attorney's fees. *See, e.g.,* Fed. R. Civ. P. 68; *Liberty Mutual Ins. Co. v. E.E.O.C.*, 691 F.2d 438 (9th Cir. 1982).<sup>5</sup> Claimant's counsel was entitled to pursue his appeal of the fee award, but not at employer's expense when his recovery after remand amounted to less than employer offered to pay in fees. *Id.* Moreover, counsel's obtaining less than employer offered demonstrates a lack of full success in the pursuit of the appeal. Therefore, we hold that employer is not liable for a fee for any services after February 12, 2016. We find the services rendered before that date to have been necessary for the pursuit of the appeal,<sup>6</sup> but as the Board rejected counsel's contention that the district director's baseline rates were in error, we disallow one-half of the remaining time. 20 C.F.R. §802.203(e); *see Hensley v. Eckerhart*, 461 U.S. 424 (1983) (accounting for partial success when entering fee award). We award a fee for 1.375 hours of Mr. Robinowitz's services and for 5.375 hours of Ms. Stokes-Avery's services.

For the reasons stated in recent Board fee orders, we award Mr. Robinowitz the hourly rate of \$450. *Modar v. Maritime Services Corp.*, BRB No. 13-0319 (Oct. 12, 2016) (fee order); *see Hill v. CLD Pacific Grain*, BRB No. 14-0281 (Nov. 18, 2016) (fee order); *Modar v. Maritime Services Corp.*, BRB No. 14-0282 (Nov. 9, 2016) (fee order);

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<sup>4</sup> Under Section 28(b) of the Act, 33 U.S.C. §928(b), an employer's tender of compensation, i.e., an unconditional offer to settle a claim, can limit its liability for a claimant's attorney's fee if the claimant rejects the settlement and receives a lower award than the employer offered to pay. *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). As employer notes, one administrative law judge has suggested that, by analogy, *Armor* may be applicable to offers to settle attorney's fee claims. *Bell v. SSA Terminals*, No. 2010-LHC-01306, 2012 WL 11943277 at \*13 (Apr. 23, 2012), *rev'd on other grounds*, BRB No. 13-0055, 2013 WL 6408563 (Nov. 26, 2013). Contrary to claimant's counsel's reply to this contention, the Board's decision in *Bell* did not address this issue because it was not raised on appeal, and, moreover, counsel misstates the holding in *Armor*. Cl. Resp. to Obj. at 3.

<sup>5</sup> We cite the Federal Rule and interpretive law for the general proposition that under certain circumstances the defendant's liability for "costs" is terminated when the plaintiff rejects an offer of judgment and obtains less by pursuing the case. We are aware that such a scenario does not always extinguish the plaintiff's right to attorney's fees payable by the defendants. *See, e.g., Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757 (10th Cir. 1999). On the facts presented here, however, the analogy is apt.

<sup>6</sup> These services reflect 2.75 hours of Mr. Robinowitz's time and 10.75 hours of Ms. Stokes-Avery's time.

*Seachris v. Brady Hamilton Stevedore Co.*, BRB No. 11-0104 (Oct. 17, 2016) (fee order); *see also Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT).<sup>7</sup> As employer does not challenge the reasonableness of the requested \$225 per hour for associate time, we find that it is a reasonable rate for services rendered in 2016 and 2017. 20 C.F.R. §802.203(d)(4). We therefore award claimant's counsel a total fee of \$1,828.13 (\$618.75 + \$1,209.38 = \$1,828.13) for work performed before the Board prior to February 12, 2016.

Accordingly, the district director's Order on Remand – Attorney's Fees and the Order Denying Motion for Reconsideration are affirmed. We award claimant's counsel an attorney fee of \$1,828.13 for work in BRB No. 16-0132, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>7</sup> In *Christensen*, the court stated:

Nor do we insist that in every fee award decision the BRB must make new determinations of the relevant community and the reasonable hourly rate. But the BRB must make such determinations with sufficient frequency that it can be confident — and we can be confident in reviewing its decisions — that its fee awards are based on current rather than merely historical market conditions.